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No. 89-1905

In the Supreme Court of the United States

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR AND
TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER, ET AL.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) preempts the regulation of pesticide use by local units of government.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) is responsible for administering the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, and therefore has a substantial interest in questions concerning the scope of FIFRA's pre-emption. At the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. First enacted in 1947, FIFRA was substantially revised by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-576, 86 Stat.

973. The 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 991 (1984). The legislation was a response to "mounting public concern about the safety of pesticides and their effect on the environment and * * * a growing perception that the existing legislation was not equal to the task of safeguarding the public interest." *Ibid.*

The revised FIFRA regulates the use, sale and production of pesticides, and provides for review, cancellation, and suspension of pesticide registrations. See generally 7 U.S.C. 136 *et seq.* Congress charged the Administrator of EPA with administering the program, and gave him a broad variety of responsibilities for discharging this mandate. See, *e.g.*, 7 U.S.C. 136a, 136f, 136p, 136q, 136r, 136u, 136w. Of particular relevance to this case, Section 24(a) of the revised FIFRA specifies that States may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by the Act. 7 U.S.C. 136v(a).

2. In September 1985, the Town of Casey, in Washburn County, Wisconsin, adopted Town Ordinance 85-1, which regulates the use of pesticides. II Pet. App. C1-C17. The ordinance requires a permit prior to application of any pesticide to public lands or private lands subject to public use, and prior to any aerial application of pesticides to private lands. *Id.* at C6. A permit applicant must submit information concerning the proposed pesticide application to the Town Board, at least 60 days prior to the proposed use. *Id.* at C7-C11. The Town Board may grant the permit, deny it, or grant it with "reasonable conditions * * * related to the protection of the health, safety, and welfare of the residents of

the Town of Casey." *Id.* at C11-C12. The ordinance provides hearing rights for the permit applicant, or for any town resident. *Id.* at C12. If a permit is granted or granted with conditions, the permittee must post a placard giving notice of pesticide application and of any label information prescribing a safe reentry time. Violators of the ordinance are subject to a fine of up to $5000 for each violation. *Id.* at C15-C16.

3. a. Respondent Ralph Mortier applied for a permit to spray a portion of his land with a pesticide. The Town granted him a permit, but precluded aerial spraying and limited the land area that could be sprayed. I Pet. App. 5-6.

b. Respondents brought a declaratory judgment action in the Washburn County Circuit Court claiming that the Town of Casey's ordinance is preempted by state and federal law. The Washburn County Circuit Court ruled that both state and federal law preempt the regulation of pesticides by local governments, and that Ordinance 85-1 is therefore invalid. II Pet. App. B14-B15.

c. The Supreme Court of Wisconsin affirmed in a 4-3 decision. The majority concluded that the Town of Casey's ordinance is preempted by FIFRA. Recognizing that FIFRA explicitly permits state regulation of pesticides (§ 24(a), 7 U.S.C. 136v(a)), the majority concluded that the language of the statute and its legislative history reveal Congress's "clearly manifested intent * * * to preempt any regulation of pesticides by local units of government." I Pet. App. 25.[1] The dissenting Justices concluded that the stat-

[1] The majority declined to "address the question of whether the enactments of the Wisconsin legislature also preempt the Town ordinance" (I Pet. App. 5 n.2), and decided only the

utory language and legislative history were insufficient to express an intent to preempt local regulation. *Id.* at 9-25 (Abrahamson, J., dissenting); *id.* at 1-9 (Steinmetz, J., dissenting).[2]

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question of federal preemption. Because the court relied on federal grounds, this Court has jurisdiction to review and decide the federal issue. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-1042 (1983); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977). See also *California* v. *Ramos*, 463 U.S. 992, 997-998 n.7, 1014 (1983) (reversing with respect to the federal question and remanding the undetermined state law issue).

In addition to the Wisconsin Supreme Court in this case, two federal courts of appeals have held that FIFRA preempts regulation by local governments of pesticide use. *Professional Lawn Care Ass'n* v. *Village of Milford*, 909 F.2d 929 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n* v. *Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table), summarily aff'g 646 F. Supp. 109 (D. Md. 1986); see also *Maryland Pest Control Ass'n* v. *Montgomery County*, 884 F.2d 160, 161-162 (4th Cir. 1989) (noting, in attorney's fees litigation, that it had previously affirmed district court holding that local pesticide ordinances "were invalid under FIFRA" and that "FIFRA preempted local laws"), cert. denied, 110 S. Ct. 1524 (1990). In conflict with these decisions, two state courts of last resort have held that FIFRA does not preempt local regulation of pesticide use. *Central Maine Power Co.* v. *Town of Lebanon*, 571 A.2d 1189 (Me. 1990); *People ex rel. Deukmejian* v. *County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). One federal district court also has held that FIFRA does not preempt local regulation of pesticide use. *Coparr, Ltd.* v. *City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), appeal pending, No. 89-1341 (10th Cir.) (argued Jan. 15, 1991).

[2] The first volume of the Petition Appendix contains the majority opinion and the two dissenting opinions; the pagination of the opinions in the Appendix is not consecutive.

SUMMARY OF ARGUMENT

FIFRA does not preempt local government regulation of pesticide use. The statutory language of FIFRA plainly is inadequate in itself to warrant a conclusion of preemption. As to FIFRA's legislative history, there are some strong and directly relevant committee statements favoring preemption of local regulation, but the legislative history does not point entirely in one direction. In our view, that history does not demonstrate that Congress "unmistakably * * * ordained" preemption of all local regulation of pesticide use. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). Nor do the purpose and operation of FIFRA require federal preemption of all local regulation of pesticide use.

1. The statutory language does not explicitly preempt local regulation of pesticide use. The state court erred in concluding that the express authorization of state regulation, provided in Section 24(a), necessarily bars local authority. The explicit authorization of state regulation may be interpreted as leaving the internal allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. Contrary to the state court's suggestion, other provisions of FIFRA also do not support a conclusion of preemptive intent in Section 24(a). Indeed, it is apparent that "State" as used in another provision of the Act, Section 23(a), necessarily includes political subdivisions.

2. Nor does FIFRA's legislative history evidence a clear and manifest intent to preempt local regulation of pesticide use. Although there are some strong committee statements favoring preemption of local regulation, the legislative history shows serious dis-

agreement among Members of Congress concerning the issue of local government regulation of pesticides. In light of that disagreement, the lack of a clear statement of preemption in the statutory text, coupled with the powerful presumption against inferring preemption of local government authority in matters of public safety and health, persuades us that insufficient evidence exists of a "clear and manifest purpose" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) to deprive local governments of the ability to regulate the use of pesticides.

3. Local regulation of pesticide use is entirely consistent with the purpose and operation of FIFRA. Indeed, FIFRA's implementation contemplates, and can be enhanced by, a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to "cooperate with * * * any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this [Act], and in securing uniformity of regulations." 7 U.S.C. 136t(b).

ARGUMENT

FIFRA DOES NOT PREEMPT LOCAL REGULATION OF PESTICIDE USE

The framework for analyzing preemption issues is well established. As this Court recently reiterated, the "question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990) (internal quotation marks omitted). Preemption can occur through explicit statutory provisions; through implication if the federal role is pervasive, if the federal interest is sufficiently dominant, or if the structure and purpose of the statute establish preemptive intent; or through a conflict between state law and federal law. See *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990); *English* v. *General Electric Co.*, 110 S. Ct. 2270, 2275 (1990); *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). "[T]he historic police powers of the States [are] not to be superseded" by federal legislation "unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The same principles govern with respect to challenges to local, as opposed to state, ordinances. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); see also *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Finally, reluctance to infer preemption is especially strong where, as here, the state or local regulation relates to health and safety concerns which have been, "primarily, and historically, a matter of local concern." *Hillsborough*, 471 U.S. at 719.

The Wisconsin Supreme Court concluded that Congress's "clearly manifested intent" was to preempt local regulation of pesticide use. I Pet. App. 24-25. In its view, the statutory language, "coupled with the legislative peregrinations of the pesticide bill, unmistakably demonstrates the intent of [C]ongress to preempt local ordinances such as that adopted by the Town of Casey." *Id.* at 22. We disagree. Neither the statutory language nor the legislative history is sufficiently clear to establish preemption; what is more, FIFRA's purpose and operation also do not require preemption of local government regulation of pesticide use.[3]

A. The Language of FIFRA Does Not Establish A Clear And Manifest Purpose To Preempt Local Regulation of Pesticide Use

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). The statutory language is plainly inadequate in itself to warrant a conclusion of preemption. Indeed, the state court both finds the statutory language "ambiguous" (I Pet. App. 15) and

[3] The dissenting Justices on the Wisconsin Supreme Court observed that "[t]he majority opinion does not fit into the traditional preemption analysis" of three categories (express, implied, and conflict), and that "[t]he majority opinion apparently attempts to find express preemptive intent not in the text of the statute but in legislative history." I Pet. App. 9 n.3 (Abrahamson, J., dissenting). Cf. *Professional Lawn Care Ass'n*, 909 F.2d at 933 (noting that "FIFRA does not preempt the village ordinance by its express terms" and that "[o]ur analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides").

relies extensively on that language (*id.* at 22-25). But the particular statutory provisions fail to convey the meaning ascribed to them by the state court.

The text contains no express preemption of local authority to regulate pesticide use. The state court nevertheless placed great weight on the specific authorization to States to regulate pesticide use. I Pet. App. 22-23. Section 24(a) of FIFRA provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. 136v(a).[4] The state court concluded that, "[f]rom this alone, it is possible to infer that regulation by other governmental entities not protected from preemption * * * is preempted." I Pet. App. 23.

The explicit authorization of state regulation, however, does not require the conclusion that local governments are preempted from regulating pesticide use. It is entirely plausible to read the provision as leaving the internal allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. See *Mendocino County*, 36 Cal. 3d at 491-492, 683 P.2d at 1159-1160, 204 Cal. Rptr. at 906-907; *Professional Lawn Care Ass'n*, 909 F.2d at 935-936 (Nelson, J., concurring). The principle is well established that local governments are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and that "[p]olitical subdivisions * * * have

[4] The words "federally registered" were added by a 1978 amendment. See Federal Pesticide Act of 1978, Pub. L. No. 95-396, § 22, 92 Stat. 835.

been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Sailors* v. *Board of Educ.*, 387 U.S. 105, 107-108 (1967) (internal quotation marks omitted). See also *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). A statutory specification that States have regulatory authority, without explicit reference to local governments, therefore does not necessarily establish preemptive intent with respect to the local governments.[5]

Indeed, to read the authorization of regulation by States and silence on local governments as preempting local governments by negative implication is not faithful to the cardinal principle that preemption will not be inferred unless there is a clearly manifested congressional intent. As we have noted, it is settled that, "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough*, 471 U.S. at 713. Silence with respect to state authority clearly does not suffice to establish express preemption of state authority, and silence

[5] The Wisconsin Court referred to the "*exclusion* rule" (I Pet. App. 24)—apparently a reference to the maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another). The court suggested that, because local governments are not explicitly mentioned in Section 24(a), they are "excluded" from its scope and "deprived of the right to regulate the use of pesticides." *Ibid.* As the California Supreme Court explained, however, "[b]ecause local governmental agencies are political subdivisions of the state, the maxim may not be applied. The maxim may be applied to comparable or perhaps similar nouns, but there is no reason to apply it to exclude agents of the enumerated party." *Mendocino County*, 36 Cal. 3d at 491, 683 P.2d at 1160, 204 Cal. Rptr. at 907.

with respect to local authority is similarly inadequate to establish express preemption of local authority—regardless of whether state authority is expressly sanctioned. This principle is especially compelling in the context of this case because regulation of pesticide use is directly related to the traditional health and safety concerns of local governments. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 990-991; *Hillsborough*, 471 U.S. at 719.

The state court referred to a variety of other provisions in an attempt to bolster its reliance on Section 24(a). The court referred to FIFRA's definition of "State," which does not include local governments. I Pet. App. 24.[6] Because local governments are subordinate entities of the State itself, however, this provision adds nothing to the analysis and fails to establish that the statutory grant of authority to States in Section 24(a) excludes further state delegation to local governments. The state court also found it "significant" that the statute explicitly refers to "political subdivisions" in some provisions (I Pet. App. 24), and cited one such instance (*ibid.*)—the requirement in Section 22(b) that EPA cooperate with "any appropriate agency of any State or any political subdivision thereof." 7 U.S.C. 136t(b). Far from establishing an express preemptive intent, however, that provision equates political subdivisions with state agencies. Just as it would be untenable to contend that a State may not regulate pesticide use through a state agency simply because state agencies are enumerated in Section 22(b) but not

[6] 7 U.S.C. 136(aa) provides, "The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa."

Section 24(a), so too it is unpersuasive to contend that political subdivisions are similarly preempted.

Other statutory references to political subdivisions and local governments are no more helpful to the state court's attempt to establish express preemptive intent through Section 24(a). Indeed, the interaction of the various statutory provisions undermines such a contention. For instance, Section 8(b), which concerns enforcement, requires manufacturers to produce records for inspection "upon request of any officer or employee of the Environmental Protection Agency or of any *State or political subdivision*, duly designated by the Administrator." 7 U.S.C. 136f(b) (emphasis added). Section 23(a)(1), in turn, authorizes the Administrator to enter into cooperative agreements with "States" to "delegate to any *State* * * * the authority to cooperate in the enforcement of [the Act] through the use of its personnel." 7 U.S.C. 136u(a)(1) (emphasis added). It is thus apparent that "State" as used in Section 23(a) necessarily includes political subdivisions, since Section 8(b) makes clear that officers of political subdivisions may be designated as inspectors. As pointed out by the concurrence in *Professional Lawn Care*, if "State" includes political subdivisions in Section 23 of the Act, "it can hardly be a forgone conclusion" that "State" excludes political subdivisions when it appears in Section 24(a). 909 F.2d at 936-937.[7]

[7] Two other references to local governments in the 1972 version of FIFRA similarly do not establish preemptive intent from the silence regarding local governments in Section 24(a). Section 20(b) requires the Administrator to formulate and periodically revise a national plan for monitoring pesticides "in cooperation with other Federal, State, or local agencies," and Section 20(c) likewise provides that monitoring procedures "shall be carried out in cooperation with other Federal, State, and local agencies." 7 U.S.C. 136r(b) and (c). Far from supporting an inference of preemption, these Sections suggest that an active role for local governments in pesticide issues is contemplated.

Two subsequent amendments also refer to local governments and similarly are more suggestive of participation by such governments than of preemptive intent. See 7 U.S.C. 136d(g) (requiring notices to the EPA Administrator and to "appropriate State and local officials" of the storage of pesticides with cancelled or suspended registrations); 7 U.S.C. 136w(e) (referring to peer review of studies by federal agencies, by "any State or political subdivision thereof," and by institutions under EPA contract, grant, or cooperative agreement).

Furthermore, in contrast to Section 24(a), FIFRA also contains a provision specifically requiring, for a different purpose, that a State exercise its authority through a state-wide entity. Section 11(a)(2)(A), as currently codified, concerns state certification of pesticide applicators—which is distinct from state regulation of pesticide use—and specifically requires, in pertinent part, that an acceptable state plan must "designate[] a state agency as the agency responsible for administering the plan throughout the State." 7 U.S.C. 136i(a)(2)(A).[8] Section 24(a) contains no such explicit provision for a state-wide program with respect to state regulation of pesticide use.

Finally, even if Section 24(a) applies only to States and not to local governments, the state court's implicit corollary—that local governments therefore

[8] This Section was in Section 4 of the 1972 revision of FIFRA (see 86 Stat. 983); it was transferred to Section 11 of FIFRA in 1988. See Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, § 801(q)(1)(A) 102 Stat. 2683.

have *no* authority to regulate pesticide use—does not follow. For, even if Section 24(a) confers some regulatory authority on the States that might otherwise be considered preempted as inconsistent with, or repugnant to full effectuation of, the federal program, that does not mean that Congress otherwise sought to occupy the entire regulatory field and prohibit all regulation by local governments. Thus, Congress's omission of local governments from the affirmative authorization of Section 24(a) would mean only that local government ordinances are subject to the usual preemption analysis accorded local ordinances (see, *e g., Hillsborough County* v. *Automated Medical Laboratories, Inc., supra*), rather than the terms of the special statutory authorization given to States under Section 24(a) (explicitly allowing any regulation of sale or use so long as it does not permit a sale or use "prohibited" under FIFRA).

With respect to the statutory text, then, Congress's silence on local governments in Section 24(a) does not establish preemptive intent; even if Section 24(a) is construed to exclude local governments from its scope, the result of such an interpretation should be not a blanket deprivation of regulatory authority to local governments, but evaluation of local regulations under the usual standard for evaluating federal preemption of local authority.

B. The Legislative History of FIFRA Does Not Establish A Clear And Manifest Purpose To Preempt Local Regulation Of Pesticide Use

Turning to FIFRA's legislative history, indications of congressional intent on preemption present a close question. Some relevant committee statements clearly favor preemption of local regulation. But the legislative history does not point exclusively

in that direction, and, in our view, fails to demonstrate that Congress "unmistakably * * * ordained" preemption of all local regulation. *Florida Lime & Avocado Growers*, 373 U.S. at 142.

In this case, the Wisconsin Supreme Court focused principally on three aspects of the legislative history —the House Committee on Agriculture report, the Senate Committee on Agriculture and Forestry report, and a conflict between the Senate Committee on Agriculture and Forestry and the Senate Committee on Commerce. I Pet. App. 16-22. We shall discuss each in turn.

The House Agriculture Committee report, filed on September 25, 1971, states that "[t]he Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971).[9] The House Agriculture Committee's bill explicitly recognized the authority of States to regulate pesticide use and sales, but it did not refer to local governments; the bill also limited the authority of States to regulate "general use" (as opposed to "restricted use") pesticides.[10] On the

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[9] Among other proposals, the Nixon Administration's proposed bill would have specified that the Act should not be construed as limiting the authority of States or political subdivisions to regulate pesticide sale or use, so long as any such regulation did not permit a sale or use prohibited by the Act. H.R. 4152, 92d Cong., 1st Sess. § 19(c) (1971), reprinted in *Hearings on Federal Environmental Pesticide Control Act of 1971, Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 904 (1971).

[10] Section 24(a) of the Houes Committee's proposed bill provided, "A State may regulate the sale or use of any

floor of the House, an amendment was accepted deleting the limitation on the regulation of "general use" pesticides. See 117 Cong. Rec. 40,044-40,045, 40,065, 40,067-40,068 (1971).[11] The floor debate on the amendment to Section 24(a) concerned the restriction on state regulation of "general use" pesticides and did not specifically address the role of local governments in regulating pesticide use. See 117 Cong. Rec. 40,034-40,046 (1971).[12] With respect to the House Agriculture Committee report itself, although a decision not to authorize regulation is not necessarily coextensive with a decision to preempt, the House Committee report may be read to provide

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pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act *or restrict by license or permit the use of a pesticide registered for general use.*" H.R. Rep. No. 511, *supra*, at 64 (emphasis added).

[11] The version that passed the House was thus the version passed by the House committee, with a deletion of the italicized language in note 10, *supra*. See 117 Cong. Rec. 40,044 (1971).

[12] The House floor debate on the "general use" restriction included brief references, in the context of that debate, to local governments. See 117 Cong. Rec. 40,037 (1971) (Rep. Anderson) ("[T]he Federal law must establish a floor. That is to say, California and Alaska must meet certain minimum Federal standards, but if the situation exists, the state and local governments may enact more stringent requirements."); *id.* at 40,066 (Rep. McKinney) ("[B]y preempting individual States from enacting tougher regulations on 'general use' pesticides, this bill negates the excellent initiatives displayed by States like New York. Section 24 of H.R. 10729, by posting overall Federal standards, fails to recognize that particular needs created by local conditions such as climate, pest population, and population density are best handled by State and local agencies.").

some evidence of congressional opposition to local regulation of pesticides.[13]

The Senate Committee on Agriculture and Forestry report contains a more emphatic statement. It declares that the Committee "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 838, 92d Cong., 2d Sess. 16 (1972).[14]

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[13] It is also possible that, as the California Supreme Court concluded, the House report should be given a more limited reading. See *Mendocino County*, 36 Cal.3d at 492, 683 P.2d at 1160, 204 Cal. Rptr. at 907 ("The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate. This is consistent with the ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions.").

[14] The Senate Agriculture Committee report further states:

> Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, *supra*, at 16-17. The language of the provision adopted by the Senate Agriculture Committee was iden-

Thus, if the Senate and House Agriculture Committee reports on the bill were the only evidence of congressional intent, the issue would be whether these statements should be given effect even though the statutory language does not itself clearly express a congressional intent to preempt local regulation.

The Senate Commerce Committee also had jurisdiction over the bill, however, and its role suggests that Congress contained conflicting views on local regulation of pesticide use. The Commerce Committee's report noted that, "[*w*]*hile the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides*, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." S. Rep. No. 970, 92d Cong., 2d Sess. 27 (1972) (emphasis added). The Commerce Committee was particularly concerned because "[m]any local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." S. Rep. No. 970, *supra*, at 27. The Commerce Committee therefore proposed, among numerous other amendments, an amendment explicitly authorizing local regulation of pesticides. *Id.* at 6, 27-28, 44. After intense negotiations between the two committees regarding the various amendments, the Commerce Committee's amendment explicitly granting regulatory authority to local governments was not adopted.[15]

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tical to the language that had been adopted in the House. See *id.* at 71.

[15] See 118 Cong. Rec. 32,251 (1972) (Sen. Talmadge) (referring to "the long period of time of negotiations between the two committees, which lasted for virtually 2 months" and concerned "63 amendments" proposed by the

Instead, the Senate approved a bill that included the Section 24(a) language initially recommended by the Senate Agriculture Committee. The Commerce Committee, however, never disavowed its view that the bill itself did not preempt local regulation.[16]

The versions of Section 24(a) that passed the House and Senate were therefore identical, and the Conference Report does not comment on the provision. See H.R. Rep. No. 1540, 92d Cong., 2d Sess. 33 (1972) (discussing Section 24(c), which concerns registration, but not Section 24(a)).

As a result of these competing strains in the legislative history, Justice Abrahamson's conclusion in her dissenting opinion below—that the "members of both Senate committees agreed to disagree on the issue of preemption of local regulation" (I Pet. App. 20 (dissenting opinion))—is an entirely plausible reading of the legislative record.[17] That record thus

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Commerce Committee); *id.* at 32,257-32,258 (reporting Commerce Committee amendments that led to changes in the Senate bill and noting that the Commerce Committee's set of three amendments regarding regulatory authority for local governments (Amendment No. 10) was not adopted in the compromise bill).

[16] Indeed, in a supplemental report, the Agriculture and Forestry Committee seemed to accept that it was the language in its original *report*, and not the language of the statute, that purported to preempt local regulation. In describing the amendments proposed by the Commerce Committee, the Agriculture Committee noted that the purpose of the Commerce Committee's amendment on local government authority was "to vitiate *the language contained in the report* of the Committee on Agriculture and Forestry, Report No. 92-838, at page 16." S. Rep. No. 838, 92d Cong., 2d Sess. Pt. II, at 46-47 (1972) (emphasis added).

[17] See also *Mendocino County*, 36 Cal.3d at 493, 683 P.2d at 1161, 204 Cal. Rptr. at 908 ("The history of the Senate

is not sufficiently free from ambiguity to supply what is lacking in the statutory text: a clear and manifest statement of intent to preempt. See also I Pet. App. 13-14 & n.4 (Abrahamson, J., dissenting) and authorities cited therein. Contrary to the state court majority's suggestion (I Pet. App. 21), moreover, the fact that an Agriculture Subcommittee chairman reiterated the Senate Agriculture Committee's initial view to the limited extent of inserting it into the Congressional Record [18] does not establish that this view was shared by the Commerce Committee, which also had jurisdiction over the bill, or by the Senate as a whole.[19]

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proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected. The act provides a 'state' may regulate, which would ordinarily be interpreted as permitting the states to delegate their power, and nothing in the compromise explanation precludes such delegation."); *Central Maine Power Co.* v. *Town of Lebanon*, 571 A.2d at 1193 (agreeing with *Mendocino County* reading of legislative history); *Coparr, Ltd.*, 735 F. Supp. at 366-367 (same).

[18] Senator Allen inserted "an explanation of [the bill] as it appeared in the original report of the Committee of Agriculture and Forestry" (118 Cong. Rec. 32,252 (1972)), which included, among many other things, the paragraph concerning the authority of local governments from the initial report (*id.* at 32,256).

[19] The state supreme court incorrectly suggested that "the full Senate * * * rejected the amendment proposed by the Senate Commerce Committee." I Pet. App. 20. Although the Senate Commerce Committee's amendment was not included in the compromise bill hammered out by the Agriculture and Commerce Committees, the Commerce Committee's amendment on local government authority was never addressed by the full Senate. See 118 Cong. Rec. 32,257-32,258, 32,262

Thus, although the legislative history contains evidence of a desire by at least some Members of Congress to preempt all local government regulation, that view was by no means uniform among the bill's authoritative supporters. In light of this disagreement, the lack of a clear statement of preemption in the statutory text and the powerful presumption against inferring preemption of local government authority in matters of public safety and health persuade us that insufficient evidence exists of a "clear and manifest purpose" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230) to deprive local governments of the ability to regulate the use of pesticides.

C. The Purpose And Operation Of FIFRA Do Not Establish A Clear And Manifest Purpose To Preempt Local Regulation Of Pesticide Use

So, too, neither the purpose nor operation of FIFRA requires federal preemption of local regulation. Properly viewed, FIFRA establishes a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to "cooperate with * * * any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this [Act], and in securing uniformity of regulations." 7 U.S.C. 136t(b). As this

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(1972). Along with all of the other Commerce Committee amendments, the Commerce Committee's amendment on local government authority was presented on the Senate floor before passage of the compromise bill (118 Cong. Rec. 32,249-32,251 (1972)), but the amendments were not addressed before consideration of the compromise substitute bill, and, as specified before that consideration, the amendments were considered withdrawn after passage of the substitute (*id.* at 32,252, 32,263). See also I Pet. App. 22 (Abrahamson, J., dissenting).

provision recognizes, not all environmental problems are best addressed by exclusively federal solutions, or even by state-wide programs. Some may more appropriately be addressed by a regulatory system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations adopted within the framework of appropriate state delegation.[20]

To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress clearly preempted all but federal regulation of labels. See 7 U.S.C. 136v(b). With respect to the use of pesticides, however, the ability of local governments to exercise discretion in enacting specific controls can be an essential part of the overall federal/state regulatory framework. Indeed, this framework is an integral part of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat.

[20] The state supreme court cited, as support for its conclusion, an EPA statement issued in 1975. I Pet. App. 25-26. This reliance is misplaced. The quoted language is from the preamble to EPA's final rule regarding approval of state plans for certification of pesticide applicators. 40 Fed. Reg. 11,700 (1975). This rule pertains to a different Section of FIFRA, 7 U.S.C. 136i(a)(2), in which Congress authorized States to develop applicator certification plans; it does not pertain to state regulation of "the use" of pesticides authorized by Section 24(a). See page 13, *supra*. The purpose, scope, and specific provisions of the applicator certification plan procedure are fundamentally different from the general issue concerning local regulation of pesticide use presented by this case. To the extent that the EPA statement in the preamble is subject to a broader reading, the language could have been more precise; EPA's position is that local governments are not preempted from regulating pesticide use.

642. Those Amendmenst require States to develop programs to protect public wellhead areas from contaminants (which include pesticides, 42 U.S.C. 300f(6)), and to "specify the duties of State agencies, local governmental entities, and public water supply systems with respect to the development and implementation of [the] programs." See 42 U.S.C. 300h-7(a)(1). Under the ruling below, local governments could be substantially hampered in playing an appropriate role in protecting public water supply wellhead areas from pollution by pesticides. Cf. Office of Ground-Water Protection, EPA, *Protecting Ground-Water: Pesticides and Agricultural Practices* 3 (1988) (recognizing importance of local governments in addressing problem of pesticide contamination of groundwater). Where, as here, "coordinate" local, state and federal "efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973).

In sum, Congress has not established with requisite clarity an intent to preempt all local government regulation, particularly in a field involving safety and health and in a context in which a local governmental role furthers the overall structure and purpose of the federal statutory program.[21]

[21] Because there is insufficient evidence of congressional intent to preempt local regulation of pesticide use, we believe that there is no need in this case to reach the Tenth Amendment issue raised in Question 2 of the petition. We note, however, that, in contrast to cases such as *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), there is no contention here that Congress is not constitionally empowered to prohibit *all* state and local regulation of the particular subject matter involved in this litigation. The

CONCLUSION

The judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted.

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claim, instead, is that, if Congress concludes that a multiplicity of local regulation would be incompatible with the purpose and operation of the federal program, Congress must also preclude state-wide regulation in order to achieve that result even though it believes that state-wide regulation should be permitted. Such a contention stands the Tenth Amendment on its head. We also note that many statutes involving federal expenditures require state-wide plans. See, *e.g.*, 42 U.S.C. 602(a)(1) and (3) (Aid to Families With Dependent Children); 42 U.S.C. 654(1) (child and spousal support); 42 U.S.C. 671(a)(3) (foster care and adoption assistance); 42 U.S.C. 1393(1) (aid to combat mental retardation); 42 U.S.C. 1396a(a)(1) (medical assistance). Cf. *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985) (federal statute explicitly permitting local governments to spend federal payments in lieu of taxes for any purpose preempts state statute requiring counties to spend 60% of the payments on schools). See also *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

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